Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

JAMES MARCELLO,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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42 pp

## QUESTIONS PRESENTED

1. When does a judgment become final so as to trigger 28 U.S.C. § 2255's statute of limitations, and how is the one-year limitations period computed?

2. Did the lower courts err in refusing to equitably toll the statute of limitations for the filing of a § 2255 petition where the father of lead counsel's father had died within two weeks before the filing deadline, the petitioner acted in good faith, the law was uncertain at the time the § 2255 petition was filed, the delay (one day) was not inordinate and the government did not identify any specific prejudice?

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## PRAYER

Petitioner James Marcello respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the United States District Court for the Northern District of Illinois' dismissal of the petitioner's motion pursuant to 28 U.S.C. § 2255 is reported at 212 F.3d 1005, and attached hereto in Appendix A. The district court's opinion dismissing the petitioner's § 2255 motion is unreported, and attached hereto in Appendix B.

## JURISDICTION

The Seventh Circuit entered judgment on May 15, 2000. This petition has been filed within 90 days of that judgment and is therefore timely. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 2255 provides in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the

> district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Rule 45(a) of the Federal Rules of Criminal Procedure provides in relevant part:

> In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

## STATEMENT OF THE CASE

### I. Original Trial Level Proceedings

In December 1992, a grand jury sitting in the Northern District of Illinois returned a multi-count indictment naming eleven defendants, including Petitioner James Marcello. The indictment charged Marcello with RICO conspiracy, 18 U.S.C. § 1962(d), conducting an illegal gambling business, 18 U.S.C. § 1955, and extortionate credit-related offenses, 18 U.S.C. § 892-94. Nine defendants went to trial.

Before trial, the district court rejected defense attempts to subject Leonard Patrick, a turncoat government witness, to a psychiatric examination to determine

his competency to testify. Patrick – a notorious 80-year-old organized crime member, murderer and convicted felon, who undisputedly committed perjury while testifying as a government witness at a previous trial – testified against Marcello and the other trial defendants for three days. Absent a grant of immunity, Patrick admitted that he had committed six murders, and that the oath meant nothing to him. Often highly combative during cross-examination, Patrick displayed a marked inability to recall events, to say nothing of lapses of inappropriate behavior while on the witness stand.

The jury trial resulted in the conviction of all trial defendants save one. The district court sentenced Marcello to 150 months imprisonment, and ordered forfeiture. (Marcello's sentence included eight levels worth of enhancements under the United States Sentencing Guidelines, including a two-level upward departure based upon alleged organized crime membership.)

## II. The Direct Appeal

Marcello and five other trial defendants appealed their convictions. While his direct appeal was pending, Marcello filed, in the district court, a motion for new trial based upon newly discovered evidence, Fed. R. Crim. P. 33, to wit: Patrick having been diagnosed as suffering from Alzheimer's disease. The motion for new trial was denied, and Marcello filed a notice of appeal from that order. Marcello later withdrew the appeal based upon the tactical decision that appellate consideration could foreclose a future petition under 28 U.S.C. § 2255.

On July 29, 1997, the Seventh Circuit affirmed Marcello's conviction and sentence. *United States v. Zizzo*, 120 F.3d 1338 (7th Cir. 1997). Thereafter, Marcello filed a timely *certiorari* petition in this Honorable Court. By an order dated December 1, 1997, this Court denied *certiorari*. *Marcello v. United States*, 522 U.S. 998 (1997). This Court's *certiorari* denial order was posted on the Seventh Circuit's docket on December 4, 1997. The December 4, 1997, Seventh Circuit docket entry does not state that this Court denied *certiorari* on December 1, 1997; rather, it says: "Filed order from the Supreme Court DENYING the Petition for Writ of Certiorari. Supreme Court Case No.: 97-724." R. 1, at 1-2, Ex. Vol. I at 17.

### III. Section 2255 Proceedings in the District Court

On December 2, 1998, Marcello and Anthony Zizzo, a trial co-defendant of Marcello's who is not a party to this petition, each represented by private counsel, filed a joint Petition for Writ of Habeas Corpus under 28 U.S.C. § 2255. R. 1. The petition advanced a variety of grounds for relief, including claims relating to Patrick's post trial Alzheimer's disease diagnosis,[1] and ineffective assistance of trial and appellate counsel premised upon the handling of Patrick's dementia, the failure to call a witness, the bungling of RICO conspiracy law and the failure to pursue a *"Singleton"* issue. The petition expressly alleged compliance with 28 U.S.C. § 2255's one-year statute of

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[1] After Marcello's trial, the State of Illinois indicted Patrick for three murders. Patrick did not withstand trial; a state trial judge adjudicated Patrick, in the latter stages of Alzheimer's disease, incompetent to stand trial.

limitations, stating that it had been filed "within one year from December 4, 1997, the date the United States Supreme Court Order denying . . . Certiori [sic] was filed." R. 1, at 1-2.

Rather than responding to the merits, the government moved to dismiss the petition on grounds that it had been filed outside 28 U.S.C. § 2255's one-year statute of limitations.

Following briefing by the parties, the district court sustained the government's motion to dismiss. App. B. In a memorandum opinion and order, the district court initially rejected the government's argument that § 2255's statute of limitations begins to run upon issuance of the court of appeals' mandate even if the defendant files a *certiorari* petition. App. B-3-5. The district court also rebuffed Marcello's argument that § 2255's statute of limitations begins to run from the date the *certiorari* denial order is posted on the court of appeals' docket. App. B-6-7. Rather, the district court deemed "the date of the entry of the order by the Supreme Court" to trigger the statute of limitations, and spurned the petitioners' contention (based upon Rule 6(a) of the Federal Rules of Civil Procedure and Rule 45(a) of the Federal Rules of Criminal Procedure) that the statute of limitations commences the day *after* the denial of *certiorari*. App. B-8-9. Without definitively resolving whether § 2255's statute of limitations could be equitably tolled, the district court also found the case inappropriate for equitable tolling since the belief that the statute of limitations expired on December 4, 1998, stemmed from attorney error. App. B-9-10.

Marcello subsequently filed an Application for Certificate of Appealability in the district court. On May 19, 1999, the district court issued a Certificate of Appealability ("CA"), stating:

> [T]he Court finds there has been a substantial showing of the denial of a constitutional right with regard to two issues as they relate to Marcello [sic] and Zizzo's petition pursuant to 28 U.S.C. § 2255: (1) what constitutes a "final" judgment so as to start the one-year limitations period running; and (2) how the limitations period is computed.

R. 16.

## IV. Section 2255 Appeal

Marcello filed a timely notice of appeal from the district court's order dismissing his § 2255 petition. Before briefing in the Seventh Circuit, the government moved to dismiss Marcello's appeal on grounds that the district court had improvidently issued the CA. Marcello objected, arguing that the law does not allow challenge to an already-issued CA. A Seventh Circuit motions judge ordered the issue taken with the case.

In its opinion, the court of appeals conceded that it had "sent what might be construed as conflicting signals on whether the grant of a CA may be challenged." *United States v. Marcello*, 212 F.3d 1005, 1007 (7th Cir. 2000); App. A-3. The panel determined that the "best approach is to say we have discretion to decide the case by reviewing the validity of the CA or by going straight to the issues

raised on appeal." App. A-3-4. In the case at hand, the panel opted to address the merits of the appeal. App. A-4.

Concerning the issue of how § 2255's statute of limitations is calculated, the panel underscored the need to "establish[ ] an unequivocal rule that lets litigants know where they stand and spares judges from becoming enmeshed in . . . nitpicking in the future." App. A-8. So on what date does judgment become final, so as to trigger the statute of limitations? On that score, the panel ruled that "[f]or defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitions for certiorari are denied." App. A-4. In formulating this ruling, the panel rejected Marcello's contention that the statute of limitations begins running from the date a *certiorari* denial order is posted on the court of appeals' docket.

The panel deemed the issue of when the one-year statute of limitations ends a "harder question," subject to different approaches. App. A-5. For example, the day this Court denies *certiorari* could be counted, "which means the 365th and final day to file the § 2255 motion falls the following year on the date before the date that certiorari was denied." App. A-6. The panel found this formula to be supported by *Lindh v. Murphy*, 96 F.3d 856 (7th Cir.) (*en banc*), *rev'd on other grounds*, 521 U.S. 320 (1997), and decisions of five other circuits regarding the length of time imprisoned individuals had to file collateral attacks after the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") went into effect, i.e., the "grace period." App. A-6.

The panel determined that another way of calculating the one-year statute of limitations would make a § 2255 motion due on the one-year anniversary of the date that this Court denied *certiorari*. App. A-7. The panel noted that this approach was supported by cases in four circuits in which the courts had ruled that the grace period for the filing of collateral relief petition ended on the anniversary date of the AEDPA's enactment. App. A-7. The panel also believed this approach to be consistent with Rule 6(a) of the Federal Rules of Civil Procedure and Rule 45(a) of the Federal Rules of Criminal Procedure, which expressly exclude from calculations the day of the act or event from which time begins to run. App. A-7. While the panel pointed out that neither approach "perfectly satisfies the finicky timekeeper," it adopted the anniversary method since it is "clear and predictable and therefore easier for litigants to remember, for lawyers to put in their tickler files, and for courts to administer." App. A-8. The court announced its holding as follows:

> The first day of the 1-year limitation period is the day after the Supreme Court denies certiorari, giving defendants until the close of business on the anniversary date of the certiorari denial to file their habeas motion. The anniversary date will be the last day to file even when the intervening period includes the extra leap year day.

App. A-8.

Applying this holding, the panel ruled that Marcello had filed his 2255 motion one day late. App. A-9. Notwithstanding the death of the father of Marcello's lead attorney two weeks before the filing deadline, and the

uncertainty surrounding § 2225's statute of limitations at the time Marcello filed, the panel also refused to toll the statute of limitations by one day. App. A-9-10.

## REASONS FOR GRANTING THE PETITION

As the Seventh Circuit panel in this case stressed, litigants and courts are in need of definitive guidance regarding the manner in which 28 U.S.C. § 2255's one-year statute of limitations is computed. Despite the panel's attempt to resolve the quagmire, a bright-line rule is presently wanting on a national basis. Indeed, litigants is some parts of the country have until the day before the one-year anniversary of *certiorari* denial to file a § 2255 petition, while litigants in other parts of the country have until the one-year anniversary of *certiorari* denial to file a petition. And, though rejected by the panel below, other plausible counting methods have been advocated by petitioners seeking collateral relief.

Before the enactment of the AEDPA, a petition under 28 U.S.C. § 2255 could be "made at any time." 28 U.S.C. § 2255 (1986). The AEDPA drastically changed this by enacting a one-year statute of limitations, which begins to run from the occurrence of specified events, including, as pertinent here, "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255 (1997).

Unfortunately, in enacting the AEDPA, "Congress did not explicitly state when a judgment of conviction becomes final." *United States v. Torres*, 211 F.3d 836, 838 (4th Cir. 2000). Nor did Congress otherwise prescribe

how the AEDPA's limitations periods should be calculated. Absent such definitions, the lower courts have divided on statute of limitations issues.[2]

In determining how to compute statutes of limitations within the AEDPA, courts, including the Seventh Circuit panel in this case, have looked to the counting methods employed in grace period cases. *See* App. A-6-7; *Gendron v. United States*, 154 F.3d 672, 675 (7th Cir. 1998); *Hoggro v. Boone*, 150 F.3d 1223, 1224 (10th Cir. 1998). Although the circuits generally agreed upon the length of

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[2] For example, in *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), the court held that in cases in which a federal convict does not file a *certiorari* petition as part of his direct appeal, the one-year statute of limitations for the filing of a § 2255 petition begins to run from the date that the court of appeals issues the mandate. The Fourth Circuit, over a dissent, followed *Gendron* in *United States v. Torres*, 211 F.3d 836 (4th Cir. 2000). In contrast, the Third, Fifth, Ninth and Tenth Circuits have held that when a federal prisoner does not file a *certiorari* petition, § 2255's one-year statute of limitations begins to run from the date on which the time for the filing of *certiorari* expires. *See United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274, 1279 (10th Cir. 2000); *United States v. Kapral*, 166 F.3d 565 (3rd Cir. 1999). *Cf.* 28 U.S.C. § 2244(d)(1) (statute of limitations for the filing of a habeas corpus petition challenging a state court conviction begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review."). In the district court in this case, the government argued that § 2255's one-year limitations period began running from the date the Seventh Circuit issued its mandate in Marcello's direct appeal even though Marcello had filed a *certiorari* petition. The district court, however, rejected this argument, App. B-3-5, and the government did not press it on appeal.

the grace period (one-year), they diverged over how to compute the one-year period. Some circuits ruled that the one-year period ended on the day before the one-year anniversary date of the AEDPA's enactment. *See Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir. 1998); *Burns v. Morton*, 134 F.3d 109, 111 (3rd Cir. 1998); *Lindh*, 96 F.3d at 866. Other circuits held that the grace period ended on the one-year anniversary of the AEDPA's enactment. *See Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999); *Flanagan v. Johnson*, 154 F.3d 196, 200-02 (5th Cir. 1998); *Mickens v. United States*, 148 F.3d 145, 148 (2nd Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998).

Exhibiting how there has been confusion on the issue, the Seventh Circuit panel in this case retreated from the counting method used in earlier Seventh Circuit grace period cases (which had made a collateral relief petition due the day before the anniversary date of the AEDPA's enactment), and held that a § 2555 petition is due by the anniversary date of a *certiorari* denial order. App. A-6-8. In the process, the panel branded Marcello's § 2255 petition late by a single day.

In the lower courts, Marcello advocated alternative counting methods which, if adopted, would have made his § 2255 petition timely. For example, Marcello argued that language found in some anniversary method cases, in combination with Rule 6(a) of the Federal Rules of Civil Procedure and Rule 45(a) of the Federal Rules of Criminal Procedure, rendered his petition timely filed. More specifically, under Rules 6(a) and 45(a), the statute of limitations commences on the day *after* the event in

question.[3] *Cf. Tribue v. United States*, 826 F.2d 633, 635 (7th Cir. 1987); *Lawson v. Conyers Chrysler Plymouth and Dodge Trucks, Inc.*, 600 F.2d 465 (5th Cir. 1979). While these rules may answer the question of when the statute of limitations begins, they do not directly answer the "harder question" of when the one-year limitations period ends. In *Mickens*, the court stated that "[w]hen a statute of limitations is measured in years, the last day for instituting the action is the anniversary date of the start of the limitations period." 148 F.3d at 148. *See Rogers*, 180 F.3d at 355 n. 13; *Ross v. Artuz*, 150 F.3d 97, 103 (2nd Cir. 1998). *See also United States v. Neman Bros. & Associates*, 777 F. Supp. 962, 964 (Ct. Int'l Trade 1991) (non-AEDPA case; "statutes of limitations are construed to include the anniversary date of the accrual of the cause of action"). Since Marcello filed his § 2255 petition by the one-year anniversary date of the start of the limitations period, the Seventh Circuit panel should not have found the petition time-barred.

Further, Marcello's district court attorneys, then navigating in uncharted waters, believed that the statute of limitations ran from the date the *certiorari* denial order was posted on the court of appeals' docket. *See also Adams v. United States*, 173 F.3d 1339, 1343 (11th Cir. 1999) (petitioner unsuccessfully advanced a similar position).

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[3] The Rules Governing Section 2255 Proceedings for the United States Courts do not contain a provision concerning time computation. In the absence of a particular provision within these Rules, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure must supply guidance. 28 U.S.C. § 2255, Rule 12.

Requiring entry of the judgment on the docket as a prerequisite to finality of judgment finds support in Rule 16.3 of the United States Supreme Court Rules which provides: "Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed." As evident, Rule 16.3 contains the following requirements: 1) the denial of *certiorari* by the Court; 2) the clerk's preparation, entry and signature of an order; 3) notification to counsel; and 4) *notification to the court of appeals*. In light of Rule 16.3, as well as Rule 36 of the Federal Rules of Appellate Procedure, which states that a "judgment is entered when it is noted on the docket," it is not far-fetched to hold that the posting of a *certiorari* denial order on the court of appeals' docket constitutes a condition precedent to the entry of final judgment. *Cf.* Fed. R. App. P. 4(a) & (b); Fed. R. Civ. P. 58 & 79(a).

Still more, United States Supreme Court Rule 44 gives a party 25 days in which to seek rehearing. Notwithstanding the low odds of a rehearing petition being granted, an argument can be made that a judgment does not actually and completely become "final" until the time for the filing of rehearing expires. *But see United States v. Willis*, 202 F.3d 1279 (10th Cir. 2000) (rejecting such an argument). This method would also render Marcello's § 2255 petition timely-filed.

The alternative counting methods suggested herein are supported by sound policy considerations. Dismissal of a first habeas petition is a serious matter, *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996), and thus the AEDPA's statute of limitations should not be applied "too harshly."

*Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). By holding the Marcello's § 2255 petition one day late, and refusing to equitably toll the statute of limitations despite the existence of compelling circumstances (e.g., the death of lead counsel's father, the unclear state of the law, the lack of delay and the absence of specific prejudice), the Seventh Circuit panel applied the statute of limitations too harshly.

As can be seen, there is considerable debate over counting methods under the AEDPA. This debate obviously needs to be put to bed by this Court. *Certiorari* should be granted.

## CONCLUSION

WHEREFORE, Petitioner James Marcello respectfully prays that this Honorable Court grant this petition and issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit, or grant any other appropriate relief.

Respectfully submitted,

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## APPENDIX A

United States Court of Appeals,
Seventh Circuit.

**UNITED STATES of America, Respondent-Appellee,**

**v.**

**James MARCELLO and Anthony Zizzo,
Petitioners-Appellants.**

**Nos. 99-2294, 99-2451.**

Argued Feb. 14, 2000
Decided May 15, 2000

Marc W. Martin (argued), Chicago, IL, for James J. Marcello.

Joseph R. Lopez (argued), Chicago, IL, for Anthony Zizzo.

Mark J. Vogel (argued), Office of the U.S. Attorney, Criminal Division, Chicago, IL, for respondent-appellee.

Before BAUER, FLAUM, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

This case gives us the opportunity to clarify when the courthouse doors close on defendants who, under the Antiterrorism and Effective Death Penalty Act (AEDPA), have one year to file for relief under 28 U.S.C. § 2255. Before getting to that, however, we first comment on an issue regarding the certificate of appealability (CA) issued by the district court.

After being convicted of an organized crime RICO conspiracy, illegal gambling, and extortion charges, James Marcello and Anthony Zizzo were sentenced to 12 and 10-year prison terms. The district court denied their

motions for a new trial; we affirmed their convictions, *United States v. Zizzo*, 120 F.3d 1338 (7th Cir.1997); and the Supreme Court denied their petition for certiorari on December 1, 1997, *Marcello v. United States*, 522 U.S. 998, 118 S.Ct. 566, 139 L.Ed.2d 406 (1997).

Represented by private counsel, Marcello and Zizzo filed a consolidated petition[1] for postconviction relief under § 2255 on December 2, 1998. District Judge Plunkett dismissed the petition as untimely but, over the government's objection, granted a CA regarding "(1) what constitutes a 'final' judgment so as to start the one-year limitations period running; and (2) how the limitations period is computed." Marcello and Zizzo appealed Judge Plunkett's dismissal of their petition. The government moved to dismiss, arguing that the judge should not have issued a CA in the first place. A lone circuit judge, acting as our motions judge, ordered that the government's challenge to the CA be considered together with the underlying statute of limitations question.

The AEDPA, enacted in 1996, narrowed and shortened the avenue of collateral relief available to convicted criminals. A state prisoner under 28 U.S.C. § 2254 or a federal prisoner under § 2255 may appeal the denial of a petition only if a CA is issued. 28 U.S.C. § 2253. A CA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

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[1] We use "petition" as a synonym for "motion," the term used in the statute.

The government attempts to knock this entire appeal out of the box by arguing that the denial of Marcello and Zizzo's § 2255 petition as untimely does not implicate their constitutional rights. Therefore, says the government, the district court never should have issued the CA and we lack jurisdiction. Marcello and Zizzo contend that once a district judge issues a CA – rightly or wrongly – the appeals must move forward to the merits.

We have sent what might be construed as conflicting signals on whether the grant of a CA may be challenged. We have said that any challenge to a CA must be made right away because quibbling over the worthiness of the CA itself after the case has progressed to briefing on the merits will not serve the CA's purpose of conserving judicial and prosecutorial resources. *See Romandine v. United States*, 206 F.3d 731 (7th Cir.2000); *Dahler v. United States*, 143 F.3d 1084, 1087 (7th Cir.1998), *cert. denied*, 525 U.S. 1090, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999); *Young v. United States*, 124 F.3d 794, 799 (7th Cir.1997). Yet in at least one other case we dismissed an issue as inappropriately certified after full briefing on the merits was completed. *See Buggs v. United States*, 153 F.3d 439, 443 (7th Cir.1998).

Unlike in *Romandine*, *Dahler*, and *Young*, the government in this case did not forfeit this issue. Instead, as we just noted, it objected to the CA in the district court and promptly moved us to dismiss the appeals before briefing on the merits took place. So what should be done?

In a situation like this – a bit of a procedural morass – we think the best approach is to say we have discretion to decide the case by reviewing the validity of the CA or by

going straight to the issues raised on the appeal. We can do this, of course, because even an unfounded CA gives us jurisdiction. *Young*, 124 F.3d at 799. However, we will exercise our discretion to review the issuance of a CA only in rare cases because, as we noted in *Young*, "[a]n obligation to determine whether a certificate should have been issued . . . increase[s] the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan." *Id.* Here, because our motions judge allowed the challenge to the CA to pass without resolution, we go to the issue raised on this appeal.

Until a few years ago a prisoner could seek postconviction relief at almost any time. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) (prisoner who filed first petition 9 years after being sentenced was not too late). That changed dramatically with the AEDPA. The new law imposed a "1-year period of limitation" on petitions, triggered by one of four events, including "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. The statute does not define "final" nor does it specify how the 1-year period should be computed.

For defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitions for certiorari are denied. *See Rogers v. United States*, 180 F.3d 349, 352-53 (1st Cir.1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 958, 145 L.Ed.2d 831 (2000); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir.1999); *United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir.1997). *See also Stringer v. Black*, 503 U.S. 222, 226, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (for purposes

of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), habeas petition's conviction became final when petition for certiorari was denied).

Although the Supreme Court denied Marcello and Zizzo's certiorari petition on December 1, 1997, that denial was not filed and docketed with this court until December 4, 1997. Marcello and Zizzo argue that the 1-year habeas clock did not start running until that later date and thus their December 2, 1998, petition arrived on time. The Supreme Court's denial of certiorari, however, is the last word on direct review. Although the Supreme Court notifies us of its decision, *see* Supreme Court Rule 16.3, the efficacy of the Supreme Court's order does not depend on when we receive it. The order denying certiorari is effective at the time of its entry by the Supreme Court. *See* Robert L. Stern et al., SUPREME COURT PRACTICE 382-84, 628-29 (7th ed.1993). No circuit has held that the certiorari denial is not final until it is received by the circuit from which the case originated. *See Adams v. United States*, 173 F.3d 1339, 1343 (11th Cir.1999). The petitioners point out that a district court's order is not final until set forth in a separate document and docketed. *See* Federal Rules of Civil Procedure 58 and 79(a); Federal Rule of Appellate Procedure 4(a) and (b); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 102 (7th Cir.1987). That analogy is inapplicable to the situation here, which involves one court notifying another of its judgment. When the Supreme Court denies certiorari, a defendant's judgment of conviction is final.

The harder question is when the 1-year period to file a § 2255 motion ends. Once the Supreme Court denied the

certiorari petition on December 1, 1997, did the defendants have until the following November 30, December 1, or December 2 to file their § 2255 motion?

The first way of computing the 1-year period, which we'll call the calendar-year method, would sound the buzzer on the petitioners at the close of business on November 30, 1998. The day the Supreme Court denies certiorari counts as the first day, which means the 365th and final day to file the § 2255 motion falls the following year on the date before the date that certiorari was denied. Support for this approach comes from *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir.1996) (en banc), *rev'd on other grounds*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), which gave already imprisoned individuals until April 23, 1997, to meet the new 1-year time limit on collateral attack established by the AEDPA that went into effect on April 24, 1996. We and five other circuits have, without analysis, followed the April 23, 1997, cutoff for those who already were imprisoned at the time the new law took effect. *Jones v. Bertrand*, 171 F.3d 499, 500 (7th Cir.1999); *Paters v. United States*, 159 F.3d 1043, 1044 n. 1 (7th Cir.1998); *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir.1998); *Young*, 124 F.3d at 796; *Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir.1998); *Brown v. Angelone*, 150 F.3d 370, 375 (4th Cir.1998); *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir.1998); *Calderon v. United States Dist. Court for the Cent. Dist. of Calif.*, 128 F.3d 1283, 1287 (9th Cir.1997), *overruled on other grounds*, 163 F.3d 530 (9th Cir.1998); *Simmonds*, 111 F.3d at 746. The issue in all of these cases was not whether the deadline should be April 23, 1997, or April 24, 1997, but rather whether prisoners whose judgments of conviction had been finalized well

before the new law's date of enactment should be allowed to seek collateral relief at all. None of these cases discussed the rationale for setting April 23 instead of April 24 as the deadline.

The second way of calculating the 1-year period, the anniversary method, closes the gates on Marcello and Zizzo when the courthouse doors shut for the day on December 1, 1998. The clock begins ticking on the day after the Supreme Court announces the denial of certiorari, which means the last day the § 2255 motion may be filed is the anniversary date of the certiorari denial. The basis for this method is Federal Rule of Civil Procedure 6(a), which says:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

*See also* Federal Rule of Criminal Procedure 45(a) ("[i]n computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included"). The three circuits that directly addressed whether the grace period should end on April 23, 1997, or April 24, 1997, for individuals who already were imprisoned at the time the new habeas rules took effect all adopted the anniversary method. *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir.1999); *Flanagan v. Johnson*, 154 F.3d 196, 201 (5th Cir.1998); *Mickens v. United States*, 148 F.3d 145, 148 (2d Cir.1998). A fourth circuit also adopted April 24 as the cutoff without any analysis. *Rogers*, 180 F.3d at 353.

Neither the calendar-year method nor the anniversary method of counting perfectly satisfies the finicky timekeeper. The Supreme Court normally issues its decisions a few minutes after 10 a.m., Eastern time, though occasionally the court releases orders in the afternoon. If the Supreme Court denied Marcello and Zizzo's petition for certiorari at 10:01 a.m. on December 1, 1997 (9:01 a.m. Central time), the petitioners technically should still be allowed to file their § 2255 petition between the time the Northern District of Illinois' clerk's office opens (at 8:30 a.m.) and 9 a.m. on December 1, 1998. So, the calendar-year method gives the defendant at least a few minutes less than 1 year to file, just as the anniversary method provides the defendant up to a few hours more than 1 year to file.

Both the calendar-year and the anniversary method are reasonable – what matters is establishing an unequivocal rule that lets litigants know where they stand and spares judges from becoming enmeshed in such nitpicking in the future. Because courts do not have stopwatches in hand when deadlines draw near, and because the anniversary date is clear and predictable and therefore easier for litigants to remember, for lawyers to put in their tickler files, and for courts to administer, we adopt the anniversary rule. The first day of the 1-year limitation period is the day after the Supreme Court denies certiorari, giving defendants until the close of business on the anniversary date of the certiorari denial to file their habeas motion. The anniversary date will be the last day to file even when the intervening period includes the extra leap year day.

Marcello and Zizzo's petition was filed a day late, and Judge Plunkett properly dismissed it as untimely. Foreclosing litigants from bringing their claim because they missed the filing deadline by one day may seem harsh, but courts have to draw lines somewhere, statutes of limitation protect important social interests, *see Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir.1990), and limitation periods work both ways – you can be sure Marcello and Zizzo would not be pooh-poohing the prosecution's tardiness if they had been indicted one day after the statute of limitations expired for their crimes.

Marcello and Zizzo's last-gasp argument is that even though they missed the deadline by a day, the statute of limitations should be equitably tolled because the law was unclear, the delay was minimal, the prosecution was not prejudiced, and Marcello's attorney's father died 2 weeks before the deadline.

Whether to push back the deadline is a different issue than when it passed. We know that § 2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling. *Taliani v. Chrans*, 189 F.3d 597 (7th Cir.1999). Even so, equitable tolling is granted sparingly. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). Extraordinary circumstances far beyond the litigant's control must have prevented timely filing. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 183 (7th Cir.1996); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir.1999). Though we sympathize with the attorney who suffered the loss of her father several weeks before the deadline, the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow

the rule. The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline simply was missed. That is not grounds for equitable tolling. *Taliani,* 189 F.3d at 598. And that makes this all more than a little ironic because allegations of trial attorney missteps formed the basis of this § 2255 motion that was filed too late. The judgment of the district court dismissing the petitions as untimely is AFFIRMED.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

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|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | **No. 98 C 7737** |
| | ) | **(92 CR 1064)** |
| **Respondent,** | ) | **Paul E. Plunkett, Senior Judge** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **JAMES J. MARCELLO and ANTHONY C. ZIZZO,** | ) | |
| | ) | |
| **Petitioners.** | ) | |

### MEMORANDUM OPINION AND ORDER

James Marcello and Anthony Zizzo have jointly filed a petition pursuant to 28 U.S.C. § 2255 ("Section 2255") challenging their convictions on the ground that the main prosecution witness, Leonard Patrick ("Patrick"), was suffering from Alzheimer's disease at the time of trial. The government, in turn, challenges the timeliness of the petition. Because we find that the petition is untimely, it is dismissed with prejudice.

### Background

The defendants were convicted of RICO violations and extortion for their activities as part of the Sam Carlisi Street Crew and the Lenny Patrick Street Crew. On January 15, 1997, they filed a joint motion for a new trial, asserting that they had newly discovered evidence that Patrick had been diagnosed with Alzheimer's-type

dementia in late 1996 and challenging his competence at trial three years earlier. In this judge's absence, Judge Andersen denied the motion. *United States v. Zizzo*, No. 92 CR 1064, 1997 WL 136705 (N.D. Ill. 1997). The petitioners then filed a motion to reconsider that denial, which this Court denied on April 10, 1997. *United States v. Zizzo*, 1997 WL 177882 (N.D. Ill. 1997). Although they filed a notice of appeal from the denial of their motion for a new trial, they voluntarily dismissed it. *See* Gov't Exs. 1 & 2.

During their prosecution of the motion for a new trial, the petitioners' appeal was pending. Their convictions and sentences were subsequently upheld by the Seventh Circuit, *United States v. Zizzo*, 120 F.3d 1338 (7th Cir. 1997), and the mandate issued on August 20, 1997. (Gov't Ex. 4.) They filed a petition for certiorari, which the Supreme Court denied by an order dated December 1, 1997. *Marcello v. United States*, 118 S.Ct. 566. *See* Gov't Ex. 5. That order was entered on the Seventh Circuit's docket on December 4, 1997. This petition was filed on December 2, 1998.

## Discussion

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") amended Section 2255 to impose a one-year time limitation upon the filing of a petition. In the provision relevant to this case, the statute states that the limitations period runs "from . . . the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. The statute does not define "final judgment." The issues presented by the instant petition are twofold: first, what

constitutes a "final" judgment so as to start the limitations period running; and second, how the limitations period is computed. The Seventh Circuit has not addressed these issues. However, on a related issue, it has held that where a defendant does not file a petition for certiorari, the judgment of conviction becomes final upon the issuance of the mandate of the Court of Appeals. *Gendron v. United States,* 154 F.3d 672, 674 (7th Cir. 1998), *pet. for cert. filed.*

The government offers two definitions of "final" judgment under Section 2255. The first is the date of the issuance of the mandate by the Court of Appeals. The theory here is that the mandate constitutes the conclusion of a defendant's direct appeal as of right, as contrasted to the discretionary nature of a petition for certiorari to the Supreme Court. That distinction has been advocated by the district courts in *Kapral v. United States,* 973 F. Supp. 495, 498 (D.N.J. 1997) and *Fadaviro v. United States,* 30 F. Supp. 2d 772, 778 (D.N.J. 1998), on the ground that the probability of the Supreme Court granting certiorari was extremely low. However, their reasoning was rejected by the Third Circuit, the only Court of Appeals to consider it, in the appeal from one of those decisions. *Kapral v. United States,* 166 F.3d 565, 571 (3d Cir. 1999). The Third Circuit concluded that despite the odds against the defendant in such a case, the Supreme Court was entitled to decide whether to grant or deny certiorari unhindered by the district court's consideration of a Section 2255 petition, stating:

> [I]f a defendant files for certiorari review, direct review is ongoing, and the commencement of a

> simultaneous § 2255 proceeding would be inappropriate. Accordingly, we hold that a judgment of conviction does not become "final" within the meaning of § 2255 until the Supreme Court affirms the conviction and sentence on the merits or denies a timely filed petition for certiorari.

*Id.* at 571.[1] We find the Third Circuit's reasons for using the date of denial of certiorari, rather than the date of the issuance of the appellate court's mandate, compelling.

The government urges us to use the date of the issuance of the mandate by analogizing to decisions regarding the trigger of the limitations period under Fed. R. Cr. P. 33 ("Rule 33") and because the petitioners did not seek a stay of the mandate during the pendency of their petition for certiorari under Fed. R. App. P. 41(b) ("FRAP 41(b)"). We are not persuaded. The Rule 33 decisions to which it cites address the issue of whether a judgment of conviction becomes final on the date of the appellate court's judgment or on the date of the issuance of its mandate. Many courts have held that it is the issuance of the appellate court's mandate, not the date of its judgment, which makes the judgment of conviction final. *See United States v. Reyes*, 49 F.3d 63, 66-68 (2d Cir. 1995), and cases cited therein. But we are not being asked to decide whether the date of the Seventh Circuit's decision or the date of its mandate should trigger the one-

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[1] In *Kapral*, the Third Circuit also rejected the Seventh Circuit's reasoning in *Gendron* and held that where a defendant did not seek review by the Supreme Court, the judgment of conviction became final upon the expiration of the 90-day time period for filing a petition for certiorari. 166 F.3d at 570-71.

year limitations period under Section 2255; we must determine whether the Seventh Circuit's mandate or the Supreme Court's denial of certiorari does so. The government has not explained why the definition of "final judgment" used in these cases is appropriate to deciding whether the pendency of a petition for certiorari extends the time for filing a Section 2255 petition, and we cannot see that it is.

The government's contention that the petitioners' convictions became final on the date of the issuance of the Seventh Circuit's mandate because they failed to seek a stay fares no better. FRAP 41(b) permits a litigant who is unsuccessful in the Court of Appeals to seek a stay of the issuance of the mandate during the pendency of a petition for certiorari before the Supreme Court. When a stay is granted, the appellate court's mandate does not issue until the Supreme Court denies certiorari. The issuance of the mandate makes the appellate court's decision final for purposes of enforcement of the judgment, and it returns jurisdiction over the case to the district court, and in such cases the operation of a stay is obvious. In this case, while the petitioners could have sought a stay, which would have prevented the issuance of mandate until the Supreme Court denied certiorari on December 1, 1997, we are not convinced that their failure to do so requires us to disregard the pendency of their petition for certiorari in determining when their judgments of conviction became final under Section 2255.

The government's second proposal is the date upon which the Supreme Court denied the petition for certiorari because the Supreme Court's action closed off the final avenue of direct appeal. This reasoning is very

appealing for an obvious reason: a judgment of conviction must be considered final when the defendant has no further means of challenging it on direct review. Indeed, in the context of retroactivity, the Supreme Court has defined finality as when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."[2] *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

The petitioners offer no substantive challenge to the contention that the denial of certiorari rendered the petitioners' judgments of conviction final. Rather, they contend that the Supreme Court's decision did not become a final judgment until it was entered on the docket of the Seventh Circuit, which, they assert, occurred on December 4, 1997.[3] Therefore, they argue, this petition, which was filed on December 2, 1998, is timely.

This Court believes that the petitioners' argument rests upon a misunderstanding of the nature of orders denying certiorari. Although they do not explicitly say so, they appear to be assuming that the Supreme Court must issue a mandate upon denying certiorari, as the Courts of Appeals do after rending [sic] their decisions. But they cite to no authority to support that contention except

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[2] The Seventh Circuit noted in *Gendron* that this definition provides guidance only, for it is up to Congress to decide the standard under Section 2255. 154 F.3d at 674.

[3] The petitioners have submitted no exhibit substantiating this date, and because they raised it in their reply brief, the government has had no opportunity to respond.

for Supreme Court Rule 16.3 ("Rule 16.3"). That rule states:

> Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed.

Sup. Ct. R. 16.3. According to the petitioners, the requirement in this rule of notification of the court of appeals means that the order must be posted on the court of appeals' docket sheet before the judgment of conviction becomes final. In contrast, the government urges that Rule 16.3 means that the order becomes final upon its entry, and that no action by the court of appeals is necessary to make the judgment final.

We have found no cases addressing this issue. But we must reject the petitioners' argument, for we are persuaded by the reasoning in Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (1993), upon which the government relies. There the authors explain:

> When the Court denies a petition for certiorari, *no judgment or mandate to that effect issues to the lower court.* Rather, Rule 16.3 directs the Clerk to enter an order of denial and "forthwith" to notify the court below and counsel of record as to the Court's action.
>
> . . .
>
> Rule 16.3 further provides that 'the order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a justice.' *This means that the order of denial is legally effective as of the time of its*

> *entry by the Supreme Court* and that lower courts may take further appropriate action in light of the denial as they see fit . . .

*Supreme Court Practice* 382 (emphasis added). Thus, under Rule 16.3 the relevant date is the date of the entry of the order by the Supreme Court, not the date of the entry of the order on the appellate court's docket. Here that date is December 1, 1997.

Recognizing their difficulty if we agree with the government, as we have, the petitioners next assert that the time for the one-year limitation period must be computed not from the date of the Supreme Court's order denying certiorari but from the following day. In support they cite to Fed. R. Civ. P 6(a) and Fed. R. Cr. P. 45(a), both of which provide that computation of a period of time begins with the day after the triggering event. True enough, but the Seventh Circuit has not computed one-year limitations period applicable to Sections 2254 and 2255 in that manner in other contexts. For example, in *Gendron*, 154 F.3d at 675, the Seventh Circuit noted that, as with Section 2255 petitions, the limitations period for Section 2254 petitions "does not begin to run until April 24, 1996, the AEDPA's enactment date."[4] And, more recently in *Jones v. Bertrand*, ___ F.3d ___, 1999 WL 151036, at *1 (7th Cir. Mar. 22, 1999), the Seventh Circuit noted again that under Section 2254 a petitioner would have "until April 23, 1997 (one year after the passage of the AEDPA) to file his petition for habeas relief." Thus, in spite of the procedural rules, the Seventh Circuit has

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[4] Both Section 2254 and Section 2255 contain one-year limitations periods.

computed the one-year period as beginning *on*, not the day after, the date of the AEDPA's enactment. Moreover, under *Jones*, the limitations period does not end on the first anniversary of the date on which it began, but on the day prior. Computing the petitioners' limitations period in a similar manner means that it began on the date on which the Supreme Court denied certiorari, which was December 1, 1997, and ended one day before the first anniversary, or on November 30, 1998.

One district court has dealt with a scenario akin to ours. In *United States v. Dorsey*, 988 F. Supp. 917 (D. Md. 1998), the court held that under Section 2255 a petitioner's conviction becomes final "on the date that a petitioner can no longer pursue direct appeal." *Id.* at 919. The court ruled that in the case before it the limitations period began on October 7, 1996, the date on which the Supreme Court denied certiorari in the defendant's appeal, and ended one year later, on October 7, 1997.

Regardless of whether we compute the one-year limitations period as the Seventh Circuit has in other contexts or as the district court did in *Dorsey* in this context, the petitioners failed to file their petition within the one-year limitations period. Their one-year period began on December 1, 1997, and they had until either November 30 or December 1, 1998 to file their Section 2255 petition. Because they did not file it until December 2, 1998, it is untimely.

Lastly, the petitioners urge that the limitations period should be equitably tolled because the petitioners (and presumably their attorneys) believed they had until December 5, 1998, to file the petition. It is not clear to this

Court that we have the authority to equitably toll the limitations period under Section 2255 at all, for the Seventh Circuit has not addressed the issue of whether the limitations period is jurisdictional or procedural. We need not decide that question, however, for even if we were able to do so, we would not equitably toll the limitations period here. While we do not doubt the sincerity of counsel's belief as to how the limitations period should be computed, they miscalculated. Attorney error is not an appropriate grounds for equitable tolling. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 183 (7th Cir. 1996). Rather, extensions of the limitations period should be granted only in "extraordinary circumstances," such as "disability, irremediable lack of information, or other circumstances beyond [the litigant's] control . . . " *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). No such circumstances exist here.

The result of our ruling is not as harsh as it may seem at first glance. The petitioners have previously presented their claims to the district court (in their original motion and on reconsideration). And, they filed a notice of appeal of the denial of their motion for a new trial, which they voluntarily dismissed.

In sum, we find that the petitioners' judgments of conviction became final on the date of the entry of the Supreme Court's order denying their petition for certiorari. That occurred on December 1, 1997. Under Section 2255 the petitioners had one year from that date to file their petition. Because they did not file it until December 2, 1998, it is untimely.

## Conclusion

Because the petitioners did not file their Section 2255 petition within one year from the date upon which their judgments of convictions became final, the petition is untimely. This case is dismissed with prejudice. All other pending motions are denied as moot. This order is final and appealable.

**ENTER:**

/s/ Hon. Paul E. Plunkett
**UNITED STATES**
**DISTRICT JUDGE**

**DATED:** 4-8-99